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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82

FLOYD ERNEST HILL,

Petitioner,

- v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

MIKE TREADAWAY
AL JOHNSON

ATTORNEYS FOR PETITIONER

261 Washington Avenue
Marietta, Georgia 30060

QUESTIONS PRESENTED

1.

(a) Whether the use for impeachment purposes of petitioner's silence, at the time of arrest and after he received Miranda warnings, violated the due process clause of the fourteenth amendment?

(b) Whether four separate and distinct references for impeachment purposes to petitioner's silence, at the time of arrest and after he received Miranda warnings, can be found to be harmless error beyong a reasonable doubt under the facts of this case?

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner FLOYD ERNEST HILL respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ____ Ga. ____, 295 SE2d 518 (Ga. 1982) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 5, 1982. A timely petition for rehearing was denied on November 29, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person ... shall be compelled in any criminal case to be a witness against himself . . . .";

the Sixth Amendment, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the assistance of counsel for his defence.";

and the Fourteenth Amendment, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF CASE*/

On the evening of Sunday, February 8, 1981, Officers Thames and Mullinax of the Austell, Georgia, Police Department responded to a radio call reporting a domestic disturbance with a man armed on Paper Mill Road of that city. (T-545) The officers responded to the call and encountered "...a group of people in the street. There was an argument going on between a male and female. Officer Mullinax was driving the car. He stepped out of his side of the car and went straight towards the male. I stepped out of my side and went to the female...." (T-546) The officers became engaged in a hand-to-hand struggle with three persons in the street. (T-547, 548) Suddenly, Officer Thames heard, "Officer Mullinax yelled to watch out....I heard Officer Mullinax yell a second time to watch it. At this point, I heard one shot, and then it sounded like a string of fire-crackers...and everybody scattered...I saw Officer Mullinax standing in the street. He had already been hit. He staggered several feet and then fell in front of the patrol car." (T-549) The entire sequence of events, from the radio call to the shooting, took less than three minutes.

Detective John Seay of the Cobb County, Georgia, Police Department was the chief investigator on the case, and was in charge of the crime scene that night. Detective Seay testified that he followed a blood trail from the scene which eventually led through a nearby residence and to petitioner, Floyd Ernest Hill, who was collapsed on the ground about 100 yards behind his residence, approximately 200 yards from the scene of the

---

*/ Each reference to the transcript of petitioner's trial in the Superior Court of Cobb County will be indicated by the letter "T" followed by the page on which the reference may be found.

shooting. (T-816-822) Detective Seay arrested petitioner and Floyd Ernest Hill was subsequently indicted for the murders of Officer Mullinax and a "bystander", Darryl Toles.

On July 21, 1981, petitioner was convicted of the murders of Officer Greg Mullinax and Darryl Toles, and on July 22, 1981, the jury imposed the death penalty for the murder of Officer Greg Mullinax and life imprisonment for the murder of Darryl Toles. Petitioner's conviction and sentence of life imprisonment for the murder of Darryl Toles were reversed by the Supreme Court of Georgia on October 5, 1982. Hill v. State, 295 S.E.2d 518 (Ga. 1982). Petitioner's conviction and sentence to death for the murder of Officer Greg Mullinax were affirmed by the Supreme Court of Georgia. This petition follows.

THE USE OF PETITIONER'S POST-ARREST SILENCE AT TRIAL

On July 8, 1981, the trial court convened a pre-trial hearing to consider several motions presented by defense counsel, among them a Motion in Limine (PT-11). The Motion in Limine sought to preclude the prosecution from introducing into evidence any testimony as to "...any alleged statement by defendant requesting assistance of counsel prior to giving any statements to investigating officer." Following the pre-trial hearing, the trial court issued an order that "...the state be precluded from attempting to introduce evidence or testimony as to...any alleged statement by the accused to the effect that 'I won't say anything until I talk to my lawyer'".

During the direct examination by the district attorney of Detective John Seay, the chief investigationg officer in this case, the following colloquy occurred:

"By Mr. Charron:

> Q. Now, when you and the other officers located Floyd Hill lying in the woods, you said that he was conscious. Did you have an opportunity to talk with Mr. Hill at that time?
>
> A. Yes, I did.

Q. Would you please tell us what you said, if anything, first, and what was said?

A. I asked him his condition first off, his physical condition.

MR. JOHNSON: Your Honor, I object to anything he may have said to Mr. Hill.

THE COURT: I will allow it over an objection.

MR. CHARRON: Thank you.

By MR. CHARRON:

Q. Go Ahead.

A. I asked him his physical condition.

Q. What did he say?

A. He said that he was shot.

Q. Did you give Mr. Hill any Miranda warnings at that time?

A. Yes. I first looked to see how badly he was wounded, and it didn't appear to be critical, so I began....first off, we called for an ambulance to transport Mr. Hill to the hospital, and then as we were waiting for this ambulance to arrive, I advised Mr. Hill of his rights orally.

Q. What rights did you advise him of?

A. I advised Mr. Hill that he had the right to remain silent.

THE COURT: Excuse me. I would like for you, if you would, to get, to give it to the court as verbatim as you can. I would like to have them just as you gave them to him, as verbatim as you remember.

THE WITNESS: Yes, sir.

MR. JOHNSON: May it please the court so we won't have any interruption, I would like to approach the bench.

THE COURT: Sure. I will give you a continuing objection if you like, Mr. Johnson.

MR. JOHNSON: Your honor, so that we can avoid a mistrial, since we have an order on this point if your honor recalls, an order on this point....

THE COURT: I understand that. He is not going to say anything like that because I have got an order. I issued an order.

MR. JOHNSON: I just wanted to make sure. (Side bar comments on other matters omitted) (Whereupon the conference at the bench was terminated)

THE COURT: Alright. Go ahead, now, and state verbatim insofar as you can exactly what you told Mr. Hill.

THE WITNESS: I advised Mr. Hill that he had the right to remain silent, that anything that he was going to say could be used against him in court. I advised him that he had the right to an attorney and to have him present during questioning, and if he could not afford one, the court would appoint him one. I also advised him that if he did choose to answer my question, to answer any questions, he could stop answering questions at any time until a lawyer was appointed, and then I asked him if he understood and he said, "Yes, he did."

By MR. CHARRON:

Q. Now, basically, what type of conversation did you have with him at that point?

A. Well, naturally I asked him, "What had happened?"

Q. What was his response?

A. His response was nil. He did not give a response.

Q. Did you have any other conversations that did not have to do....

MR. JOHNSON: Your honor, I would like to approach the bench.

THE COURT: Well, let me say this. Now, ladies and gentlemen of the jury, I have already touched on this but I want to say this, "Under no circumstances, as I have told you, is a defendant required to say anything at any time. Under no circumstances does the defendant have any burden of proof whatsoever in a criminal case. Y"all understand that, don't you? (All twelve jurors nod heads affirmatively.)

THE COURT: It is perfectly within any defendant's legal rights and privileges to decline to say anything, and certainly in this instance where he was injured, so I don't want any unfavorable inferences to be drawn in any way, form or fashion by virtue of the statement of this witness, that he declined to say anything further. Do you all understand that fully? If you do, nod your heads in the affirmative. I want to see that you fully understand that. (All twelve jurors nod heads affirmatively.)

THE COURT: Alright.

By MR. CHARRON:

Q. Sgt. Seay....

MR. JOHNSON: Your honor....

THE COURT: Would you rather perfect the record later on, Mr. Johnson?

MR. JOHNSON: Yes, I'll do that, in light of...

THE COURT: I'll give you a full opportunity.

MR. JOHNSON: Thank you, your honor.

By MR. CHARRON:

Q. Sgt. Seay, did you have a conversation with Mr. Hill while you were waiting for the ambulance not concerning any crime scene or investigation that you were conducting?

A. Yes, sir. I asked him if he was in great pain, and he said, "Yes, my arm hurts", and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked me for a cigarette, which I found him a cigarette and gave it to him and at that time he stated that he wanted his lawyer." (T-827-832)

After the lunch recess, which occurred minutes later, petitioner's motion for mistrial was denied. (T-832-843)

Petitioner Floyd Ernest Hill took the stand in his own behalf, stating that he had no gun on his person down at the crime scene and that he did not shoot any gun at all that night. Mr. Hill stated that he was shot himself through the shoulder and forearm, but that he could not determine who had shot him. The accused stated that he had walked up to his house after the shooting had stopped seeking help. While sitting in his bedroom, Mr. Hill testified that he was confronted by one Edward Saffo, the original "man with a gun" to whom the police radio call was directed, and Mr. Saffo was carrying a rifle. Petitioner testified that he reached under the mattress of his bed and got a .32 automatic for protection from Mr. Saffo. Mr. Hill stated that he then left his home in a state of confusion and passed out in the copse of woods behind his home. (T-1065-1071).

Police officers testified that a .32 caliber pistol was found under Mr. Hill in the woods (T-824), but no spent rounds were found in that weapon (T-826) and that gun was never matched to any projectiles found at the scene or on the persons of the victims. (T-977). Earlier, during the testimony of a chemist from the Georgia State Crime Laboratory, it was established that an analysis of swabbings from the petitioner's hands was "... negative for metals associated with gunshot residue." (T-1048). Hand wipings from the hands of the "bystander", Darryl Toles, were positive for metals associated with gunshot residue. (T-1051, 1052).

During the cross-examination of petitioner Floyd Ernest Hill there occurred the following:

> BY THE DISTRICT ATTORNEY, MR. CHARRON:
>
> Q. Mr. Hill, you testified that you carried the .32 revolver. Is this the one that you carried into the woods?
>
> A. The automatic, yes.
>
> Q. Why did you carry this into the woods?
>
> A. Because I had it pointed towards Saffo and I did not know what Saffo had on his mind, going for me, and nothin. I just had it for protection.
>
> Q. Did you ever try to explain all of this to anybody before today? (Emphasis added)
>
> MR. JOHNSON: Your honor, I am going to make an objection to that.
>
> THE COURT: I sustain the objection, ladies and gentlemen of the jury. Disregard the last question. Do y'all understand that" He is under no duty to explain." (T-1084).

After the close of the evidence, the District Attorney made the following remarks in his closing arguments to the jury:

> "....you will see some marked differences as to what the defense originally said in the trial and how it changed and reacted to testimony as the trial progressed, and I think that is very important, because at the end, that will explain something that we call rebuttal witnesses, and why the state holds back some witnesses....(T-1187) now, what would have happened, I submit to you, ladies and gentlemen, if we had put the fishnet up first before Floyd Hill had testified, what would we have done if we had put up that evidence showing that every shot was fired from the front? What would his story have been? (T-1213) Why didn't we put that up originally? Well, what would Floyd say again. (T-1215) .... when it came down to the defense, who doesn't have to put up any evidence....that's right. They don't have to ever say a word, but when it came down to the defense giving a story, what happened? Who testified as an eyewitness? Floyd Hill. (Emphasis added). (T-1224)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner first raised the issue of use of his post-arrest silence by the filing of a Motion in Limine (Transcript of Pre-trial Hearing, T-11 et seq.) seeking to preclude the prosecution from introducing any testimony or evidence as to "Any alleged statement by Defendant requesting assistance of counsel prior to giving any statements to investigating officers." Petitioner's counsel requested that the trial court order the District Attorney to instruct his witnesses not to comment on the post-arrest silence of the accused. The trial court thereafter entered an order that provided "...the State be precluded from attempting to introduce evidence or testimony as to...Any alleged statement by the accused to the effect that 'I won't say anything until I talk to my lawyer.'".

During his trial, petitioner, in addition to the continuing objection created by Georgia law by the entry of the trial court's order pursuant to Petitioner's Motion in Limine, objected in a timely manner to each of the prosecutor's references to the post-arrest silence of the petitioner. First, petitioner, through his counsel, objected to the investigating officer's relating any conversation with the accused at the time of his arrest, and the trial court overruled said objection. (T-828) Then, the question was asked, "What rights did you advise him of?", and the answer given, "I advised Mr. Hill that he had the right to remain silent." Petitioner's counsel then asked to approach the bench, and the trial court offered a "continuing objection"; whereupon, the following conference at the bench transpired:

> "Mr. Johnson: Your honor, so we can avoid a mistrial, since we have an order on this point if your honor recalls, an order on this point--
>
> The Court: I understand that. He is not going to say anything about that he declined to say anything or anything like that. He's not going to say anything like that, because I've got an order. I issued an order." (T-829)

Undaunted, the prosecutor proceeded to elict the first reference to petitioner's post-arrest silence as follows:

> Q. Now, basically what type of conversation did you have with him at that point?
>
> A. Well, naturally, I asked him what happened.
>
> Q. What was his response?
>
> A. His response was nil. He did not give a response.
>
> Q. Did you have any other conversations that did not have to do-- (T-830)

Petitioner's counsel asked to approach the bench, and the trial court then gave "curative instructions", as set out hereinabove. The trial court also offered counsel an opportunity to "perfect the record" later on, which counsel accepted.

The prosecutor then resumed his questioning of the investigating officer:

> Q. Sergeant Seay, did you have a conversation with Mr. Hill while you were waiting for the ambulance, not concerning any crime scene or investigation that you were conducting?
>
> A. Yes, sir. I asked him if he was in great pain, and he said yes, his arm hurt, and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked me for a cigarette, which I found him a cigarette and gave it to him, and at that time he stated that he wanted his lawyer. (T-832)

Petitioner's counsel made an immediate objection, with the trial court reserving for counsel the opportunity to correct the record without sending the jury out immediately, and the witness testified for some few more minutes until the lunch recess. At the end of the lunch recess, petitioner had his first opportunity to move for a mistrial, and he did so. Petitioner's motion was denied, and, more than two hours after the impermissible comment on the silence of the accused, the jury was given more "curative instructions". (T-832-859)

The next reference to the silence of petitioner after his arrest and the recitation of Miranda warnings came during the cross-examination of petitioner, when, in regard to petitioner's exculpatory testimony the prosecutor asked, "Did you ever try to explain all of this to anybody before today?"(T1084)

An immediate objection by petitioner's counsel was sustained, with the comment, "He's under no duty to explain." (T-1084)

The final reference to the post-arrest silence of the petitioner occured during the prosecutor's closing argument, wherein he stated, "...when it came down to the defense, who doesn't have to put up any evidence--that's right. They don't have to ever say a word, but when it came down to the defense giving a story, what happened? Who testified as an eyewitness? Floyd Hill." (T-1224) No objection was made by petitioner, but the Motion in Limine and the trial court's order, in addition to the trial court's statements from the bench during the trial, had given counsel a continuing objection to the use of petitioner's post-arrest silence for impeachment.

On appeal to the Supreme Court of Georgia, petitioner alleged, among others, the following enumerations of error:

"5.

> The Trial Court erred in refusing to grant Defendant's motion for mistrial when the State's witness, Detective John Seay, on direct examination testified that the Defendant was given his Miranda warning and refused to make any statement.

6.

> The Trial Court erred in refusing to grant Defendant's motion for mistrial when the State's witness, Detective John Seay, on direct examination testified that the Defendant stated in response to questioning after being given the Miranda warning that he wanted to talk to his lawyer.

7.

> The Trial Court erred in not granting a mistrial when the District Attorney, on cross-examination of the Accused, commented on the silence of the Accused after he was given Miranda warnings and directly linked the silence of the Accused to his exculpatory story.

8.

> The Trial Court erred in not granting a mistrial or in not granting a new trial upon Defendant's motion for the same, in that the District Attorney's repeated violations of the Trial Court's pretrial Order pursuant to the Defendant's motion in limine which directed the prosecutor to refrain from attempting to introduce evidence or testimony about any alleged statement of the Accused to the effect that "I don't want to say anything until I talk to my lawyer." so prejudiced the

rights of the Defendant as to demand a new trial." In his "Brief for the Appellant/Defendant", petitioner fully recited all portions of the transcript of his trial which point to his silence after arrest and receipt of Miranda warnings. This Court's opinion in Doyle v. Ohio, 426 U.S. 610 (1976) was cited to the Georgia Supreme Court as authority for the reversal of petitioner's conviction and sentence of death.

The Supreme Court of Georgia rejected the petitioner's claim, although that court found, by its own count, three clear references to the silence of the petitioner. The Georgia high court concluded, "Although more than one reference was made to appellant's (petitioner's) pre-trial silence during the presentation of the evidence, under the circumstances of this case we do not find repeated deliberate violations of Miranda v. Arizona, supra, or Doyle v. Ohio, supra." Hill v. State, 295 SE2d 5__ (Ga. 1982), Appendix A, Slip Opinion at 11. The Georgia court noted that "The evidence in this case, if not overwhelming, was quite strong. See U. S. v. Smith, supra. In view of all the foregoing, we conclude that the curative instructions given were sufficient to render the error harmless beyond a reasonable doubt. See, U. S. v. Kaplan, 576 F2d 598 (5th Cir. 1978); U. S. v. Fairchild, 505 F2d 1378 (5th Cir 1975)." Hill v. State, 295 SE2d 5__ (Ga. 1982), Appendix A, Slip Opinion at 12. Regarding the prosecutor's directly tying the exculpatory story of petitioner to his post-arrest/post-Miranda warnings silence in a manner almost identical to that used by the prosecutor in Doyle v. Ohio, supra, the Georgia Supreme Court merely commented, "The third reference came much later in the trial and was an unanswered question, the objection to which was immediately sustained, with curative instructions. See Smith v. State, supra." Hill v. State, 295 SE2d 5__ (Ga. 1982), Appendix A, Slip Opinion at 11.

REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THERE CAN BE A "HARMLESS ERROR" EXCEPTION TO THE CONSTITUTIONAL PROSCRIPTION AGAINST THE USE FOR IMPEACHMENT OF THE POST-ARREST/POST-MIRANDA WARNINGS SILENCE OF THE ACCUSED.

B. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER, UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE USE OF PETITIONER'S POST-ARREST/ POST-MIRANDA WARNINGS SILENCE FOR IMPEACHMENT CAN BE FOUND TO BE HARMLESS ERROR BEYOND A REASONABLE DOUBT.

The facts of this case present to this Court, in the context of a case wherein the death penalty has been imposed, an important issue not resolved expressly by this Court's opinion in Doyle v. Ohio, 426 U.S. 610 (1976): whether the use for impeachment purposes of the post-arrest/post-Miranda warnings silence of the accused can be found to be harmless error beyond a reasonable doubt in any case; and, if so, what standards apply to a determination of harmlessness.

In Doyle itself, this Court found harmful error in the prosecutor's use for impeachment of Doyle and Woods' silence after arrest and Miranda warnings, even though their exculpatory story could only be described by this Court as "not entirely implausible", Doyle at 613. The prosecutor in Doyle cross-examined the accuseds, at their respective trials, with such questions as "And I assume you told him all about what happened to you?" and "But in any event you didn't bother to tell Mr. Beamer anything about this?", Doyle at 613, 614. The Doyle prosecutor went on to comment on the silence of the accuseds and their exculpatory testimony in his closing argument. Doyle at 615, n 5.

The instant case presents a record reinted from beginning to end with repeated violations of the Doyle holding. First, petitioner, recognizing the inherent prejudicial effect of impeachment use of the silence of the accused after arrest, moved in limine to restrict the prosecutor from presenting any such testimony in the presence of the jury. As set out above,

the trial court recognized the impermissibility of such tactics, and issued an order restricting the prosecutor from even attempting to introduce such testimony. The trial court went so far as to order the prosecutor to instruct his witnesses on the effects of the court's order. The efforts of petitioner's counsel and the trial court went for nought, however, as set out hereinabove. With the chief investigating officer on the witness stand there occurred this sequence of events: Question, Objection; Question, Objection; Conference at the bench; Question, Objection; Curative Instructions; Renewed Objection; Question, Objection; Question, Objection; Curative Instructions. (T-828-857). It cannot be gainsayed that this series of questions, objections and rulings by the trial court served only to highlight and call the attention of the jury to the silence of petitioner after arrest and Miranda warnings. Illustrative of the trial context, and of the tight rope that petitioner's counsel was walking in his efforts not to unduly highlight the issue for the jury, while at the same time preserving this gross error for appellate review, is the fact that counsel felt compelled, after denial of his motion for mistrial, to request that the trial court reserve any further curative instructions until its final charge to the jury. The trial court refused. (T-857)

It was during the cross-examination of petitioner that the prosecutor directly linked the silence of the accused with his exculpatory story, a la Doyle. The District Attorney asked, "Did you ever try to explain all of this to anybody before today?" (T-1084) It is respectfully submitted that, irrespective of whether this Court finds there to be a "harmless error exception" to its holding in Doyle, this direct linkage of petitioner's silence and his exculpatory story demands reversal of his conviction and sentence of death. The lower Federal courts which have found there to be a harmless error exception to Doyle have followed the ruling of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F2d 1240 (5th Cir. 1977)

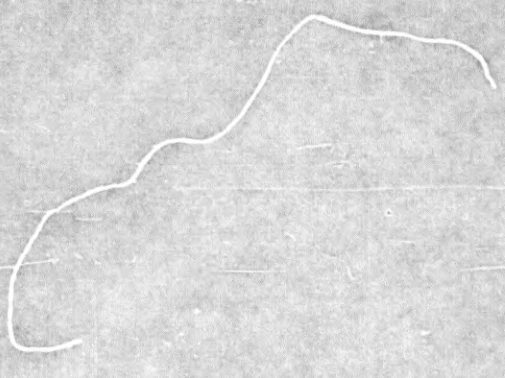
In Chapman, the Fifth Circuit concluded that Doyle violations, for purposes of a harmless error test, should fall into three categories:

> (1) When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous.
>
> (2) When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, i. e. when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.
>
> (3) When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to the silence of the accused is harmless error. Chapman at 1249-50.

It is clear that petitioner's case falls into the first category when the prosecutor's question, "Did you ever try to explain all of this to anybody before today?", is considered in its context of cross-questioning regarding petitioner's exculpatory story. In any event, as even the Georgia Supreme Court recognized, petitioner's exculpatory story was not transparently frivolous and the indicia of guilt was not overwhelming, so that reversal would follow even upon application of the second standard.

Petitioner recognizes that in Doyle this Court expressly reserved the issue of harmless error because the state had failed to argue that the violation was harmless error. Doyle at 618-619. It is respectfully submitted that should this Court find that a harmless error exception exists in the Doyle context, that the standards set out in Chapman provide the stringent safeguards for the rights of the accused that are necessary to make those rights more than an abstraction in the courtroom. In light of the clear and repeated violations of due process found in this case, including the prosecutor's closing remarks as set out hereinabove, petitioner respectfully

seeks certiorari from this Court. Further, petitioner respectfully submits, in light of the clear violations in this case, that either summary reversal of his death sentence, or vacation of his sentence with a remand for reconsideration in light of Doyle v. Ohio, supra, is warranted.



CONCLUSION

For the reasons hereinabove specified, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

MIKE TREADAWAY

AL JOHNSON

ATTORNEYS FOR PETITIONER

261 Washington Avenue
Marietta, Georgia 30060

DATED: January 26, 1983

Marietta, Georgia

APPENDIX A

In the Supreme Court of Georgia Decided: OCT 05 1982

38423. HILL v. THE STATE.

SMITH, Justice.

Appellant, Floyd Ernest Hill, was convicted for the malice murder of Austell police officer Greg Mullinax and for the felony murder of Darryl Toles. Appellant was sentenced to death for the murder of Mullinax and received a life sentence for the murder of Toles. He raises in his appeal thirteen enumerations of error. We affirm the conviction and the sentence of death for the murder of Mullinax but reverse the conviction for the murder of Toles.

On the evening of February 8, 1981, Virginia Barber and Edward "Tweet" Saffo, who lived together in a trailer behind appellant's residence off Paper Mill Road in Austell, began to argue. Saffo twice fired a .32 caliber pistol and then left, to cool off, he claimed.[1] Ms. Barber went inside her trailer to call the police, then grabbed a pair of scissors and set out after Saffo.

---

[1] Saffo testified that he only fired the gun into the ground because he was on probation and did not want to walk off carrying a loaded gun.

EXHIBIT A

Appellant, meanwhile, was sitting in his automobile in his driveway, drinking and listening to tapes with his friend Wayne Lockett. Janice Miller, sister of the victim Darryl Toles, approached appellant and asked for his help. Appellant declined, saying he was too drunk to intervene. After Ms. Miller left, however, appellant asked one of his daughters to go into his house and get his gun.

Virginia Barber caught up to Saffo just as he reached Paper Mill Road and just as officers Greg Thames and Greg Mullinax of the Austell Police Department arrived. Saffo, at this time, was relatively calm, but Ms. Barber was cursing and lunging at Saffo. When Officer Thames attempted to subdue and disarm her, she told him, "Turn me loose. I'm not the one you are supposed to be getting." By this time, several of Ms. Barber's children had arrived, including a 15 year old son armed with a butcher knife. As the officers were placing Ms. Barber into the police car, her son attacked the officers. When they responded to this new threat, Ms. Barber exited the police vehicle and rejoined the fight. Then Saffo hit one of the officers and told them to leave his wife alone.

Into this melee arrived appellant, who had driven up and parked immediately behind the police vehicle. Appellant got out and walked towards the action. Officer Thames hollered, asking appellant to help clear the young children out of the area before someone got hurt. Appellant failed to respond. Officer Mullinax then yelled, "Floyd, get out of here." As Officer Thames was standing by the left rear door of the police car struggling with Janice Miller, he heard a shot and then a series of shots that "sounded like a string of firecrackers." Everyone

scattered. Officer Thames saw Mullinax stagger and fall. Thames radioed for help, picked up Mullinax's shotgun and covered him until help arrived. After the shooting, Thames saw Darryl Toles for the first time, lying in the street.

When the investigators arrived, they followed a trail of blood which led into and out of appellant's house, back to the Saffo trailer and into the woods behind the trailer. There they found appellant, armed with a .32 caliber pistol and suffering from several gunshot wounds. Two days later, a .38 caliber pistol was discovered next to a tree between the Hill and Saffo residences. The pistol contained three empty cartridge cases and one misfired round. It was later determined that all three bullets which struck Officer Mullinax had been fired from this pistol.

One of Mullinax's wounds was fatal. Darryl Toles also died. The two bullets removed from Toles had been fired from Officer Mullinax's revolver.

Appellant testified that he had come down to help out and was caught in the crossfire between Officer Mullinax and someone to his rear. He claimed that he had, in fact, been struck at least once from the rear. Afterwards he wandered off, dazed and confused, retrieved a .32 caliber pistol from his residence for protection, and stumbled past Saffo's trailer and into the woods. Appellant claimed not to have had a weapon while down at the road where the shooting took place.

Medical testimony offered in rebuttal, however, established that all of appellant's entry wounds were frontal. Moreover, the testimony of the other witnesses was unanimous that Darryl Toles had no weapon and that

only appellant and Officer Mullinax were involved in the shooting. Several witnesses recognized the pistol that appellant used as a .38 that they had seen before in appellant's possession. All who were in a position to see who shot first agreed that appellant did.

1. Appellant's first three enumerations of error are the general grounds.

(a) The evidence, viewed in the light most favorable to the prosecution, is more than sufficient to convince a rational fact finder beyond a reasonable doubt that appellant is guilty of the murder of officer Greg Mullinax. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

(b) Appellant's conviction for the murder of Darryl Toles must, however, be set aside.

Count two of the indictment charged that appellant, "while in the commission of a felony, to wit: murder, cause[d] the death of Darryl Toles . . . by shooting at Greg Mullinax, a police officer, and when said Greg Mullinax returned gunfire towards [appellant,] said Darryl Toles was inadvertently struck and killed."

Count two is predicated upon a killing committed by one resisting a felony. Our felony murder statute provides: "A person . . . commits the crime of murder when in the commission of a felony he causes the death of another . . . irrespective of malice." Code Ann. § 26-1101 (b). In a case of first impression, this court unanimously concluded that our felony murder statute as it is presently written does not penalize the killing of one of the parties to the underlying felony by the intended victim of the underlying felony. State v. Crane, 247 Ga. 779 (279 SE2d 695) (1981).

In the instant case, the victim of the alleged felony murder was not one of the parties to the underlying felony, but was an innocent bystander. The result, however, must be the same. As we said in State v. Crane, supra, "The key words of the statute are 'he causes.' These words can be read either to include or to exclude the homicide in the present case. One construction would be that the words 'he causes' require the death to be caused directly by one of the parties to the underlying felony. Another construction would be to include also those deaths indirectly caused by one of the parties . . ." Although we favored the latter construction we felt obliged to adopt the former.[2] Applying the former construction to this case, it is clear that appellant did not directly cause the death of Darryl Toles and may not be convicted therefore.[3] If this result be viewed as a defect in our felony murder statute, the remedy lies with the legislature.

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[2] See also Anno. 56 A1R3d 239, 242: "In considering the applicability of the felony murder rule where the killing is committed by someone resisting the felony, numerous courts have adopted the view that for a defendant to be held guilty of murder, it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him."

[3] Code Ann. § 26-801 provides that under certain circumstances, one may be held responsible for a crime one did not directly commit. A review of that Code section shows none of the circumstances to be applicable here. The closest, perhaps, is § 26-801 (b) (2) which allows a finding of criminal liability where one "intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity." (Emphasis supplied.) There is, however, in this case no allegation or evidence that appellant intentionally caused Officer Mullinax to shoot Darryl Toles.

2. In his ninth enumeration of error, appellant contends the trial court erred in charging Code Ann. § 26-801 (b), defining parties to a crime. Appellant argues that there was evidence presented to support his theory that Toles was not an innocent bystander but was a party to the crime. Since the jury's verdict does not specify whether it found Toles to have been an innocent bystander as alleged, it is possible, appellant argues, that because of the court's charge on parties to a crime, the jury found Toles to be a co-felon, in which event State v. Crane, supra, would bar his conviction for the murder of Toles.

Since we have already set aside appellant's conviction for the murder of Toles, we need not further consider this enumeration of error.

3. In his fourth enumeration of error, appellant claims the trial court erred in failing to excuse for cause a juror who was a retired supervisor of industries at the Atlanta Federal Penitentiary.

The juror stated that he could listen to the evidence and make an impartial decision based thereon. Appellant offers no reason other than the juror's former employment for his claim that the juror should have been excused. However, a supervisor of industries at a federal penitentiary is not a police officer who must be excused when challenged for cause in a criminal case. Moreover, the juror here was no longer so employed at the time of the trial. Hutcheson v. State, 246 Ga. 13 (268 SE2d 643) (1980), is therefore inapplicable and there is no merit to this enumeration of error. See Depree v. State, 246 Ga. 240 (2) (271 SE2d 155) (1980), and Jordan v. State, 247 Ga. 328, 340 (fn. 16) (276 SE2d 224) (1981).

4. In his fifth, sixth, seventh and eighth enumerations of error, appellant complains of the court's failure to grant a mistrial and later, a new trial, based upon improper references to appellant's exercise of his right to remain silent after being given Miranda warnings.

Before the trial began, appellant filed a motion in limine, asking that the state be precluded from introducing evidence of an "alleged statement by defendant requesting assistance of counsel prior to giving any statements to investigating officers."

At the hearing on the motion, appellant's contentions and the court's response were as follows:

> Mr. Johnson (for appellant): . . . Now, my motion goes to this. I am attempting to prevent the police officer from testifying, "Well, we arrested Floyd and right off the bat he said, "I don't want to talk to anybody until I see my lawyer.'" That type of statement in and of itself, rather than the fact that he made no statement, "He gave us no statement--"
>
> The Court: . . . Usually it is handled this way . . . the state just simply says, "Did the defendant so and so give you a statement?" "No, sir." That's it. I think they can go that far.
>
> Mr. Johnson: <u>That's fine</u>. (Emphasis supplied.)

In the court's written order on the motion in limine, the state was ordered not to introduce evidence of any statement by appellant "to the effect that 'I won't say anything until I talk to my lawyer.'"

During the opening statements, appellant's attorney indicated the evidence would show that appellant had

departed the scene of the shooting because he was confused and disoriented and did not know what had happened. Thereafter, during the state's case, the prosecutor elicited testimony that after finding appellant in the woods, the chief investigating officer had advised appellant of his various Miranda rights. Then the following transpired:

> Q. (by the D.A.) Now basically, what type of conversation did you have with [appellant] at that point?
>
> A. Well, naturally I asked him what had happened.
>
> Q. What was his response?
>
> A. His response was nil. He did not give a response.

At this point, the court, on its own motion, instructed the jury that a defendant has the right to remain silent and that no unfavorable inference should be drawn from the exercise of that right. The questioning continued:

> Q. Sergeant Seay, did you have a conversation with [appellant] while you were waiting for the ambulance, <u>not concerning any crime scene or investigation that you were conducting</u>? [Emphasis supplied.]
>
> A. Yes sir. I asked him if he was in great pain, and he said yes, his arm hurt, and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked for a cigarette, which I found him a cigarette and gave it to him, and at that time he stated that he wanted his lawyer.

Appellant objected and moved for a mistrial. The court did not rule on the objection, but denied the motion for mistrial and gave lengthy curative instructions.[4]

Later, during the state's cross examination of appellant, the prosecutor asked, "Did you ever try to explain all of this to anybody before today?" Appellant's objection was immediately sustained.

(a) In Griffin v. California, 380 U. S. 608 (85 SC 1229, 14 LE2d 106) (1965), the U. S. Supreme Court held that state prosecutors and judges may not comment on a defendant's failure to testify. Shortly thereafter, the court announced that the prosecution may not use at trial the fact that the defendant stood mute or claimed his Fifth Amendment privilege during police custodial interrogation. Miranda v. Arizona, 384 U. S. 456, 468 n. 37 (86 SC 1602, 16 LE2d 694) (1966). After Miranda, some courts, while barring the use of a defendant's prior silence during the prosecution's case in chief, allowed its use for impeachment purposes. See United States v. Hale, 422 U. S. 171, 175 n. 2 (95 SC 2133, 45 LE2d 99) (1975). However, in Doyle v. Ohio, 426 U. S. 610 (96 SC 2240, 49 LE2d 91) (1976), the Supreme Court held that since Miranda warnings at least implicitly inform a person that his decision to remain silent cannot be used against him, the use for impeachment purposes of a defendant's

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[4] These included, in part: ". . . You don't have to make any statement at all until you talk to your lawyer. It is a pretty good idea, to tell you the truth. That's what I would do, so there is no unfavorable inference to be drawn from that, and I don't think anybody was trying to create an unfavorable inference . . . Do y'all understand that? If so shake your head in the affirmative." The record shows that all 12 jurors nodded affirmatively.

silence, at the time of his arrest and after receiving his Miranda warnings, violates the due process clause of the Fourteenth Amendment.[5] Improper reference to a defendant's silence, however, does not automatically require reversal. See DeBerry v. State, 241 Ga. 204 (243 SE2d 864) (1978), and Smith v. State, 244 Ga. 814 (262 SE2d 116) (1979). Assuming that a defendant has preserved the point by proper objection, the error may be harmless beyond a reasonable doubt. Harrell v. State, 249 Ga. 48 (5) (SE2d) (1982); see also, Stone v. Estelle, 556 F2d 1242, 1246 (5th Cir. 1977). The determination of harmless error must be made on a case by case basis, taking into consideration the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of defendant's guilt. Sullivan v. Alabama, 666 F2d 478, 485 (11th cir. 1982).

(b) There are a number of factors in this case which, taken together, lead us to conclude that the references to appellant's pre-trial silence were harmless beyond a reasonable doubt.

First, it is doubtful that appellant preserved for appellate review any objections to the first reference to his silence, in view of defense counsel's agreement with the court during the hearing on the motion in limine that more reference to his silence would not be improper. See

---

[5] Not all use of a pre-trial silence for impeachment purposes is barred. See Doyle, supra, n. 11 (use of fact of silence to rebut claim by defendant that he had previously related the same exculpatory story offered at trial); Jenkins v. Anderson, 447 U. S. 231 (100 SC 2124, 65 LE2d 80) (1980) (use of pre-arrest silence); Fletcher v. Weir, U. S. (102 SC 1309, LE2d) (1982) (use of post arrest silence where no Miranda warnings given).

Harley Davidson Motor Company v. Daniel, 244 Ga. 284, 285-6 (260 SE2d 20) (1979); Gober v. State, 247 Ga. 652 (2) (278 SE2d 386) (1981). At least, the motion in limine is relevant to a consideration of the misconduct of the prosecutor. That is, although the prosecutor deliberately elicited the testimony that appellant made no response after having been informed of his Miranda rights, the prosecutor could reasonably have assumed that appellant had no objection to such testimony.

The second reference, to appellant's request for an attorney, was an unsolicited, spontaneous comment by the witness following a question that the prosecutor had limited to a conversation "not concerning any crime scene or investigation that you were conducting." See, United States v. Smith, 635 F2d 411, 413 (5th Cir. 1981).[6]

The third reference came much later in the trial and was an unanswered question, the objection to which was immediately sustained, with curative instructions. See Smith v. State, supra.

Although more than one reference was made to appellant's pre-trial silence during the presentation of the evidence, under the circumstances of this case we do not find repeated deliberate violations of Miranda v. Arizona, supra, or Doyle v. Ohio, supra. See, U. S. v.

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[6] We note also that the prosecutor was apparently attempting to show that appellant was not as confused and disoriented as he claimed to be. However, appellant had not yet testified at the time the question was asked; moreover, the prosecutor attempted to avoid reference to appellant's request for an attorney. We do not decide whether deliberate use of a defendant's request for an attorney to impeach testimony that the defendant was confused and disoriented would fit within the exception to Doyle, supra, enunciated in footnote 11 of that opinion.

Espinosa-Cerpa, 630 F2d 328, 334 (5th Cir. 1980). Moreover, the prosecutor made no reference to and did not attempt to capitalize on appellant's pre-trial silence during closing arguments. See, U. S. v. Dixon, 593 F2d 626, 630 (5th Cir. 1979).

The evidence in this case, if not overwhelming, was quite strong. See U. S. v. Smith, supra. In view of all the foregoing, we conclude that the curative instructions given were sufficient to render the error harmless beyond a reasonable doubt. See, U. S. v. Kaplan, 576 F2d 598 (5th Cir. 1978); U. S. v. Fairchild, 505 F2d 1378 (5th Cir. 1975).

5. The trial court did not err in refusing to give appellant's request to charge on reasonable doubt. "The failure to give requested instructions in the exact language requested, where the charge given substantially covers the same principles, is not grounds for reversal." Kelly v. State, 241 Ga. 190 (4) (243 SE2d 857) (1978). Appellant's tenth enumeration of error is without merit.

6. In his eleventh enumeration of error, appellant contends the court erred in allowing the state to offer proof of a prior felony conviction during the sentencing phase of his trial, because notice required by Code Ann. § 27-2503 was not furnished until the day of the trial.

Code Ann. § 27-2503 (a) states that "only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible." Here, the notice was provided prior to trial. See Cobb v. State, 244 Ga. 344 (20 (a)) (260 SE2d 60) (1979). Appellant does not contend that the conviction was not his, that he was not represented by counsel, or that the conviction was inadmissible for any other reason. There

is no merit to this enumeration of error. Franklin v. State, 245 Ga. 141 (5) (263 SE2d 666) (1980).

7. In his twelfth enumeration of error, appellant contends that matters extrinsic to the evidence impermissibly influenced the jury, depriving appellant of a fair trial by an impartial jury. This allegation was raised in appellant's motion for new trial. In support thereof, appellant offered a copy of a memorandum written by the district attorney and sent to the court administrator.

The letter recited that one of the jurors had visited the district attorney after the trial was over and expressed concern for the apparent lack of courtroom security for the safety of the empanelled jurors. Specifically, the juror had suggested that jurors not be herded through the spectator lobby in easy access to the public and friends and neighbors of the defendant on trial. The memorandum stated, "It seems that because of these worries, some of the jury panel felt intimidated and expressed to each other the possibility of not rendering a fair verdict based on the evidence, but one motivated by fear."

"The affidavits of jurors may be taken to sustain but not to impeach their verdicts." Code Ann. § 110-109. There are limited exceptions to this rule. Watkins v. State, 237 Ga. 678 (229 SE2d 465) (1976). Compare, Aguilar v. State, 240 Ga. 930 (1) (242 SE2d 620) (1978).

If we were to assume an exception here, we still could not agree that appellant has shown that he was deprived of a fair trial by an impartial jury. The letter offered to "prove" lack of a fair trial was merely hearsay. Moreover, the letter indicates only a "possibility" of a verdict motivated by fear. Appellant has

not shown that the verdict was not based upon the evidence or that it was motivated by fear. This enumeration of error is meritless.

8. Appellant contends in his brief that reversible error occurred when the court allowed the chief investigating officer to remain at the state's table throughout the trial in violation of the rule of sequestration.[7]

Under the Georgia Unified Appeal Procedure, this court "shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court." Code Ann, Appendix to Chapter 27-25, Rule IV (b) (2). Thus we address this allegation of error even though it was not included in appellant's enumerations of error.

"It has been repeatedly held that it is within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either the state or the accused." Benton v. State, 9 Ga. App. 291 (6) (71 SE 8) (1911). This exercise of discretion should be based on a stated need by the party requesting the exception. Montos v. State, 212 Ga. 764 (3) (95 SE2d 792) (1956).

---

[7] Code Ann. § 38-1703 states: "In all cases either party shall have the right to have the witnesses of the other party examined out of the hearing of each other. The court shall take proper care to effect this object as far as practicable and convenient, but no mere irregularity shall exclude the witness.

Here the state informed the court that it had almost one hundred exhibits and the assistance of the chief investigating officer was necessary to properly present the case. The trial court did not abuse its discretion by allowing the witness to remain. Disby v. State, 238 Ga. 178 (1) (231 SE2d 763) (1977); Jarrell v. State, 234 Ga. 410 (6) (216 SE2d 258) (1975).

Appellant further contends that even if the trial court properly allowed the witness to remain at the state's table, the witness should have been required to testify first, absent some showing by the state of a need to present his testimony later. See McGruder v. State, 213 Ga. 259 (9) (98 SE2d 564) (1961). But a trial court may allow a witness excepted from the rule to testify after other witnesses have testified if the opposing party does not request the court to require the witness to testify first. Appellant made no such request. See, Lloyd v. State, 146 Ga. App. 584 (1) (246 SE2d 697) (1978); Colson v. State, 138 Ga. App. 366 (7) (226 SE2d 154) (1976).

Appellant's allegations with regard to the Rule of Sequestration are without merit.

SENTENCE REVIEW

The death penalty imposed in this case is automatically reviewed by this court under the standard set forth in Code Ann. § 27-2537. Moreover, since the indictment in this case was returned April 21, 1981, the Georgia Unified Appeal Procedure is applicable to this case.

9. Except as noted in division 8 of this opinion, we find no matters not enumerated as error that need to be addressed.

10. Upon review of the record in this case, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor.

11. The jury found as a statutory aggravating circumstance that "the murder of Gregory Mullinax was committed against a peace officer while engaged in the performance of his official duties." See Code Ann. § 27-2534.1 (b) (8). The evidence supports a finding of this aggravating circumstance beyond a reasonable doubt. Code Ann. § 2534.1 (c); Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

12. Appellant contends that the death sentence should be set aside because it is excessive and disproportionate under the facts and circumstances of this case. We disagree.

The cases reviewed include all murder cases resulting in a life or death sentence appealed to this court since January 1, 1970, involving the killing of a police officer or correctional officer. Of the twelve death cases included in the appendix, the four earliest do not involve any statutory aggravating circumstances as these cases predate our 1973 death penalty law. They are included to illustrate the willingness of juries to impose the death sentence for the murder of a police officer. In the remaining eight cases, a finding of (b) (8) was present. In Stevens the only aggravating circumstance left after our review was (b) (8) (jury findings of (b) (7) and (b) (10) were reversed).

The nine life cases chosen for comparison are: Jordan v. State, 247 Ga. 328 (276 SE2d 224) (1981); Gore v. State, 246 Ga. 575 (272 SE2d 306) (1980); Whitaker v.

State, 246 Ga. 163 (269 SE2d 436) (1980); Lemley v. State, 245 Ga. 350 (264 SE2d 881) (1980); Washington v. State, 245 Ga. 117 (263 SE2d 152) (1980); Muhammed v. State, 243 Ga. 404 (254 SE2d 356) (1979); Patterson v. State, 239 Ga. 409 (238 SE2d 2) (1977); Cromer v. State, 238 Ga. 425 (233 SE2d 158) (1977); McElroy v. State, 237 Ga. 245 (227 SE2d 255) (1976).

In McElroy and Gore, the murder or the trial occurred when there was no death penalty in effect. Muhammed was a Fulton County case in which the death penalty was waived (the jury had difficulty reaching a verdict of guilty). Jordan and Whitaker were cases arising out of a prison riot and escape attempt at Reidsville; it was not possible to determine who actually inflicted the fatal wounds.

Extinuating circumstances not present in the instant case existed in both Patterson (not totally implausible claim of self defense and racial and religious harassment) and Washington (insanity defense presented).

We conclude that appellant's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed in part, reversed in part. All the Justices concur, except Weltner, J., who dissents to division 1 (b).

38423. HILL v. THE STATE.

APPENDIX.

Johnson v. State, 225 Ga. 378 (174 SE2d 902) (1970); Callahan v. State, 229 Ga. 737 (194 SE2d 431) (1971); Whitlock v. State, 230 Ga. 700 (198 SE2d 865) (1971); Bennett v. State, 231 Ga. 458 (202 SE2d 99) (1973); Ross v. State, 233 Ga. 361 (211 SE2d 356) (1974); Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977); Willis v. State, 243 Ga. 185 (253 SE2d 70) (1979); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980); Lewis v. State, 246 Ga. 101 (268 SE2d 915) (1980); Stevens v. State, 247 Ga. 598 (278 SE2d 398) (1981); Wallace v. State, 248 Ga. 255 (282 SE2d 325) (1981).

END OF EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of the Supreme Court of Georgia and that I served copies of the attached petition for writ of certiorari on respondent by depositing copies in the United States Mail, first class mail, postage prepaid, addressed as follows:

Hon. Michael Bowers
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Hon. Thomas J. Charron
District Attorney
Cobb County Courthouse
Marietta, Georgia 30060

All parties required to be served have been served. Done this 27th day of January, 1983.

Mike Treadaway

MIKE TREADAWAY
261 Washington Avenue
Marietta, Georgia 30060

Attorney for Petitioner

82-6115
24

Office-Supreme Court, U.S.
FILED
JAN 28 1983
ALEXANDER L. STEVAS,
CLERK

82-6115

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

FLOYD ERNEST HILL Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

Mike Treadaway
MIKE TREADAWAY

AL JOHNSON

261 Washington Avenue
Marietta, Georgia 30060

404 422 5494

ATTORNEY(S) FOR PETITIONER

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

FLOYD ERNEST HILL Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, FLOYD ERNEST HILL, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are you presently employed? Yes ___ No X

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   NOT APPLICABLE

   b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

   February, 1981 -- $800.00 per month

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No X
b. Rent payments, interest or dividends? Yes ___ No X
c. Pensions, annuities or life insurance payments? Yes ___ No X
d. Gifts or inheritances? Yes X No ___
e. Any other sources? Yes ___ No X

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. Spending money received from my family into my prison account (approx $100.00)

3. Do you own cash, or do you have money in checking or savings account?

Yes X No ___ (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned. eighteen cents ($00.18)

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No X
If the answer if "yes," describe the property and state its approximate value. ___

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. My wife (Ann Hill); my daughter (Anita, age 12)

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Floyd E. Hill
FLOYD ERNEST HILL

STATE OF GEORGIA
COUNTY OF BUTTS

FLOYD ERNEST HILL, being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

Floyd E. Hill
FLOYD ERNEST HILL

Subscribed to and sworn to before me,
this the 25th day of January, 1983.

Notary Public

My Commission expires:

Notary Public, Georgia, State at Large
My Commission Expires June 19, 1984

CERTIFICATE

I hereby certify that the petitioner herein, FLOYD ERNEST HILL, has the sum of $ .79 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center: NONE

Leonard Langley

Authorized Officer of Institution

NO. 82-6115

Office-Supreme Court, U.S.
FILED
MAR 7 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FLOYD ERNEST HILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER OR NOT THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT PETITIONER WAS NOT HARMED, UNDER THE FACTS OF THIS CASE, AS A RESULT OF ANY REFERENCES TO PETITIONER'S PRETRIAL, POST-ARREST SILENCE?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Floyd Ernest Hill, was indicted by the March Term, 1981, Cobb County Grand Jury for the malice murder of Austell, Georgia police officer Gregg Mullinax and the felony-murder of Mr. Darryl Toles. (R. 3-4). Petitioner was tried on July 13-22, 1981, and was found guilty on both counts. He received the death penalty for the murder of officer Mullinax and received a life sentence for the felony-murder of Darryl Toles. (R. 33-38). The death penalty on the malice murder count was supported by the jury's finding that said murder was committed against a peace officer while he was engaged in the performance of his official duties. (R. 37-38, T. 310, 312-315). See, O.C.G.A. § 17-10-30(b)(8); Ga. Code Ann. § 27-2534.1(b)(8).

On direct appeal to the Georgia Supreme Court, Petitioner's conviction and sentence for malice murder were affirmed; however, his coviction for the felony-murder of Darryl Toles was reversed, because it was clear that Petitioner did not actually shoot Toles, and under the Georgia felony-murder statute as interpreted by the Georgia Supreme Court, in order to be convicted of felony-murder a defendant must directly cause the death of the victim. Here, Toles was killed by a police officer who was returning fire at the Petitioner. Hill v. State, 250 Ga. 277, 295 S.E.2d 518 (1982). Petitioner's motion for a rehearing in the Georgia Supreme Court was denied on November 29, 1982. Thereafter he filed the instant petition for a writ of certiorari in this Court.

PART TWO

STATEMENT OF THE FACTS

A summary of the facts which the jury was authorized to find is set out in the opinion of the Georgia Supreme Court. Hill v. State, supra at 277-279.

The evidence showed that on the night of February 8, 1981, Austell, Georgia police officer Gregg Mullinax was shot to death while answering a call for assistance. A bystander at the scene, Darryl Toles, was also shot and killed during the shooting incident.

The shooting arose as a collateral consequence of a domestic argument between Virginia Barber and her common-law husband, Edward Saffo, both of whom had been drinking. (T. 601, 666, 682, 711). During the quarrel, Saffo had fired his .32 caliber pistol at least twice. (T. 751-752, 662-663, 672, 711-713). When Saffo physically struck Virginia Barber with his hand, a relative of Barber, who was at the scene, approached Petitioner Hill who was in a nearby parked vehicle, and asked for assistance. Petitioner initially indicated that he would not help, stating, "He was too drunk." (T. 752, 761-762). Ultimately, the police were called and notified of the volatile situation. (T. 545-546, 753). Meanwhile, Petitioner had asked his daughter to retrieve his gun from his nearby residence. (T. 701-702).

During the argument between Barber and Saffo, Barber grabbed a pair of scissors, and pursued Saffo into the street. (T. 639-640, 664, 753). Virginia Barber's fifteen year old son, Stanley, also took a butcher knife from the trailer and followed after Barber and Saffo. (T. 641, 753).

Austell police officer Gregg Thames, testified that he was riding in a patrol unit with officer Mullinax when they received a call pertaining to the aforesaid incident between Barber and Saffo. The radio call indicated that there was a domestic argument, one of the participants was armed, and that

a man was beating a woman. (T. 545). Thames testified that when he and Mullinax arrived, he observed a group of people in the street watching the confrontation. (T. 545-546). Thames testified that Mullinax stepped out of the police vehicle and went directly towards Saffo who stated, "Everything is okay. It's cool. Let's go home." (T. 546). Thames did not see Saffo in possession of a pistol. (T. 560). While Mullinax went towards Saffo, officer Thames directed his attention towards Virginia Barber, who continued to argue and fight. (T. 546). Thames testified that he arrested Barber and attempted to place her in the rear of the patrol car but had difficulty getting the door closed. (T. 546-547). Thames testified that as he tried to force the door closed in the patrol car, Barber's son, Stanley, became involved in the fight. He was ultimately subdued and placed inside the vehicle; however, by this time, Virginia had escaped. (T. 547, 570-572).

While officer Thames was scuffling with Virginia Barber, he noticed a vehicle drive up. Testimony from other witnesses showed that the Petitioner had driven his green Torino down the road and had parked directly behind the police car. (T. 548, 607, 665, 756). Officer Thames requested help from the Petitioner, asking that he clear nearby children away from the area, but Petitioner refused to help. (T. 549, 562, 576). As officer Thames was attempting to close the door on Stanley Barber, another female bystander, apparently Janice Miller, started to scuffle with him. (T. 549, 571). During this time Darryl Toles arrived at the scene, and stood by the Petitioner's car watching the confrontation. (T. 610-611, 688-689, 693-695). Darryl Toles did not involve himself in the argument, but remained merely a bystander. (T. 719).

While officer Thames was struggling with Janice Miller, Petitioner was seen pulling a pistol, and the first shots were fired by him. (T. 549-550, 666, 677, 757-758, 760). Several eyewitnesses testified that they observed Petitioner firing his .38 caliber pistol. (T. 645-647, 651-654, 668-669, 717, 764).

Rapid shots were thereafter exchanged between the Petitioner and officer Mullinax. (T. 720, 758). During the exchange of fire, Darryl Toles was shot as he stood nearby. (T. 552, 758-759). Officer Mullinax was also struck by the gunfire. (T. 550, 558-559).

Petitioner was wounded during the shooting, left the scene and retured to his house after asking a friend to retrieve his automobile. (T. 671, 703, 1067, 1078). Edward Saffo also left the scene, and proceeded to the Petitioner's house to see about his niece. Upon arriving, he observed the Petitioner sitting in the bedroom of his house, bleeding and holding a gun which he promptly pointed at Saffo. (T. 721, 1067, 1081). According to the Petitioner he then left the residence and collapsed in the nearby woods. (T. 1067-1068).

Police officers followed a trail of blood from the scene of the shooting to the Petitioner's residence and eventually to a wooded area where he was found lying on the ground. (T. 582-584, 593, 824-825, 827-828). He was taken to the Cobb General Hospital where his wounds were treated. (T. 882, 833). He had wounds in his right lower arm, his upper arm, and on the right side of his chest. (T. 793-794, 797-798). A .32 caliber revolver containing five live rounds were in Petitioner's possession at the time he was found by police. (T. 825-826, 977).

Although tests run from the swabbing of Petitioner's hands were negative for metal residue which may have resulted from his firing a pistol (T. 1048), Cobb County police officer Robert Tressel testified that he had observed gunpowder stippling on the Petitioner's right hand as he was performing a neutron activation analysis test on the Petitioner. (T. 1089-1090).

The Chief Medical Examiner for Cobb and DeKalb Counties, Dr. Joseph Burton, performed an autopsy on police officer Mullinax. (T. 987-990). The cause of death to officer Mullinax was a gunshot wound to his chest caused by a .38 caliber bullet. (T. 1000). Officer Mullinax was also wounded in the left thigh and left forearm. (T. 993, 997).

Dr. Burton also performed the autopsy on victim Darryl Toles. (T. 1002). Victim Toles sustained bullet wounds to the chest, arm and thigh areas. (T. 860-861, 1002-1004). The cause of death to Mr. Toles was the gunshot wound which entered his chest. (T. 1004).

Several days after the shooting incident, fifteen year old Kevin Tucker discovered a .38 caliber pistol in the wooded area between the Petitioner's residence and the Barber trailer. (T. 775-776, 868). The gun contained three empty .38 caliber cartridge casings and one .38 caliber Peters bullet which had been struck by the firing pin but which had misfired. One of the cylinders was also empty. (T. 869-870).

Ballistics tests were run on Officer Mullinax's .357 Magnum revolver and on the .38 caliber pistol which was found in the wooded area approximately twenty feet from where the Petitioner was discovered. All six bullet cartridges from officer Mullinax's weapon had been fired. (T. 840, 972). No tests were conducted on the .32 caliber pistol which was found in the Petitioner's possession at the time he was discovered by police, because it was determined that none of the victims had been shot with that caliber weapon. (T. 825-826, 978, 983-984). Ballistics tests determined that the bullets recovered from the body of officer Mullinax, had been fired from the .38 caliber pistol which had been found by Kevin Tucker, near where the Petitioner was discovered. (T. 980, 995). Tests also revealed that the two. 357 Magnum bullets removed from Darryl Toles and from under his stretcher had both been fired from officer Mullinax's revolver. (T. 975-976, 1001, 1009).

Petitioner testified at trial and admitted driving to the murder scene. He stated he had attempted to assist the police officers until he heard gunfire. (T. 1066-1067, 1070, 1072-1073). He alleged that officer Mullinax fired first, and that he did not know where the other shots had come from. (T. 1075). Petitioner also testified that he was shot from

behind (T. 1085), and he denied that he had fired a weapon at the scene. He admitted returning home after being wounded. (T. 1066-1068, 1078-1079, 1086). Petitioner testified that after he returned home, he retrieved his wife's pistol from under a mattress, and when Saffo arrived, he pointed the pistol at Saffo and told him to leave. According to the Petitioner, at that point he became scared, ran outside, and passed out in the woods. (T. 1067-1068, 1080-1081).

The testimony of Dr. Burton refuted Petitioner's statement that he had been shot from behind. (T. 1095-1105). Burton examined Petitioner's T-shirt and determined that the shirt fibers indicated the bullet passed into the front of the shirt and exited at the back. (T. 1098-1099). Furthermore, Petitioner's chest wound exhibited characteristics of a gunshot entry wound, and not an exit wound. Petitioner exhibited no wounds which demonstrated that he had been shot from back to front. (T. 1100, 1102-1103).

Additional facts may be referred to in the following portion of this Brief when necessary to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

THE GEORGIA SUPREME COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A MISTRIAL, FINDING THAT ANY REFERENCES TO THE PETITIONER'S PRETRIAL, POST-ARREST SILENCE CONSTITUTED HARMLESS ERROR UNDER THE FACTS OF THIS CASE.

Petitioner urges this Court to grant the writ of certiorari in order to resolve the question of whether or not the prosecution's references to a defendant's pretrial, post-arrest silence may be found to be harmless error in any case. Alternatively, Petitioner urges this Court to grant the writ to determine whether or not, under the specific facts of this case, the Georgia Supreme Court properly found said references to be harmless error beyond a reasonable doubt.

It is now well-settled that prosecutorial comment upon a defendant's silence following his arrest and advisement of the Miranda warnings, is constitutionally prohibited whether the comment is for substantive or impeachment purposes. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975); Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966). Notwithstanding the constitutional prohibition against a prosecutor's use of a defendant's post-arrest silence, this Court has suggested that any such error might be rendered harmless under the standard of Chapman v. California, 386 U.S. 18 (1967). United States v. Hale, supra; Doyle v. Ohio, supra. Every Federal Circuit Court of Appeals has recognized and applied the harmless error standard in reviewing defendants'claims of improper prosecutorial comment upon their post-arrest silence. See Morgan v. Hall, 569 F.2d 1161 (1st Cir. 1978); United States v. Nunez-Rios, 622 F.2d 1093, 1101 (2nd Cir. 1980); United States v. Agee, 597 F.2d 350, 359 (3rd Cir. 1979), cert. denied, 442 U.S. 944 (1979); Williams v. Zahradnick, 632 F.2d 353, 360-365 (4th Cir. 1980); United

States v. Dixon, 593 F.2d 626, 629 (5th Cir. 1979), cert. denied, 444 U.S. 861 (1980); Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977); United States v. Rowe, 591 F.2d 391, 399 (7th Cir. 1979); Jones v. Wyrick, 542 F.2.d 1013 (8th Cir. 1976), cert. denied, 430 U.S. 956 (1977); United States v. Wycoff, 545 F.2d 679 (9th Cir. 1976), cert. denied, 429 U.S. 1105 (1977); United States v. Birdwell, 583 F.2d 1135, 1139 (10th Cir. 1978); Sullivan v. Alabama, 666 F.2d 478, 485 (11th Cir. 1982); United States v. Williams, 556 F.2d 65, 67 (D.C. Cir. 1977), cert. denied, 431 U.S. 972 (1977). Thus, there appears to be unanimity among the federal courts on the applicability of the harmless error standard to the question at hand.

Recent federal cases have recognized that the question of harmless error in a Doyle v. Ohio context must be judged on a case by case basis. "The decision requires an examination of the facts, the trial context of the error, and the prejudice created thereby juxtaposed against the strength of the evidence of the defendant's guilt." Sullivan v. Alabama, supra, at 485, citing United States v. Menses-Davila, 580 F.2d 888, 890 (5th Cir. 1978). Accord, Williams v. Zahradnick, supra.

In United States v. Dixon, supra, the Fifth Circuit Court of Appeals examined several specific factors in making its decision as to whether or not a comment on the defendant's silence in that case contituted harmless error. The court first examined whether or not the prosecutor's question and the witness's answer would have been likely to cause any prejudice to the defendant in the minds of the jury. Second, the court examined whether or not it was likely that the trial court's instructions cured any slight prejudice which may have resulted. Third, the court examined whether the prosecutor attempted to capitalize on the tainted testimony during the remainder of the trial. Fourth, the court examined whether the defendant may have opened the door to comment by giving the impression that he had fully cooperated with the police

authorities. Fifth, the court examined the comment in light of the strength of the case against the defendant. Id., at 629-730.

In the instant case, the trial court issued a pretrial order directing the State not to introduce evidence of any statement by the Petitioner "to the effect that 'I won't say anything until I talk to my lawyer.'" (R. 23). As Petitioner points out in his brief, during the questioning of Detective John Seay, the chief investigating officer in the case, the district attorney ellicited some testimony from the chief investigating officer pertaining to Petitioner's actions and statements which he made following his arrest, after Petitioner was found lying in the wooded area behind his residence. He was conscious at the time. (T. 824). It is relevant to note that the stage was set for the district attorney's line of questioning by defense counsel's opening argument. In order to explain why Petitioner Hill was found lying in a wooded area with a pistol, defense counsel told the jury how the Petitioner was wounded in the shootout, and further stated:

> He either goes into shock or staggers or he is confused. He doesn't know what to do . . . He's confused. He doesn't make the best choices in the world . . . He doesn't know where the shots are coming from . . . He is confused. He is wounded. He is bleeding profusely. He goes up past the trailer in back of his house and on into the woods. Twenty yards or twenty feet or so he collapses. (T. 459, 460).

Thus, it was clear from the outset of the trial that the defense intended to explain the Petitioner's flight from the crime scene by asserting that he was confused due to the severity of his wounds. The intent of the district attorney's questioning was to illustrate that in fact the Petitioner was

neither confused nor seriously hurt, and that he did not accidentally stumble into the woods, but he was found there as a result of his purposeful intent to flee the crime, the scene and hide in the wooded area. The questioning of Detective Seay was intended to show that the Petitioner was fully conscious and aware of what was occurring around him. The following are two of the areas of questioning objected to by the Petitioner:

Q. Now, when you and the other officers located Floyd Hill lying in the woods, you said that he was conscious. Did you have an opportunity to talk with Mr. Hill at that time?

A. Yes, I did.

Q. Would you please tell us what you said, if anything, first, and what was said?

A. I asked him his condition first off, his physical condition.

* * *

Q. What did he say?

A. He said that he was shot.

Q. Did you give Mr. Hill any Miranda warnings at that time?

A. Yes. I first looked to see how badly he was wounded, and it didn't occur to be critical, so I began . . . first off, we called for an ambulance to transport Mr. Hill to the hospital, and then as we were waiting for this ambulance to arrive, I advised Mr. Hill of his rights orally.

* * *

Q. Now, basically what type of conversation did you have with him at that point?

A. Well, naturally I asked him, "what had happened?"

Q. What was his response?

A. His response was nil. He did not give a response.

* * *

Q. Sergeant Seay, did you have a conversation with Mr. Hill while you were waiting for the ambulance, not concerning any crime scene or investigation that you were conducting?

A. Yes, sir. I asked him if he was in great pain, and he said yes, his arm hurt, and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked me for a cigarette, which I found him a cigarette and gave it to him, and at that time he stated that he wanted his lawyer. (T. 827-832).

As the Georgia Supreme Court recognized, the district attorney was justified in believing that the defense really had no objection to the solicitation of the first statement by Sergeant Seay that Petitioner did not give a response when he was initially asked, "What had happened?" In the pretrial motion hearings, defense counsel indicated he had no objection to the State asking whether the Petitioner had given a statement or to a witness testifying that he had not. Hill v. State, supra, 259 Ga. at 283. It is also clear that the second reference to Petitioner's request for an attorney was an

unsolicited comment from witness Seay after the district attorney had specifically asked about Petitioner's statements "not concerning any crime scene investigation that you [detective Seay] were conducting."

The third alleged reference to Petitioner's silence occurred during the cross examination of the Petitioner. After Petitioner had testified that he was carrying a .32 caliber revolver for his own protection the district attorney asked him, "Did you ever try to explain all of this to anybody before today?" The trial court immediately sustained defense counsel's objection and instructed the jury that the Petitioner was under no duty to explain, and that the jury should disregard the last question. (T. 1084).

Here, as the aforesaid statement of facts amply shows, there was overwhelming evidence of the Petitioner's guilt, and the challenged statements did not have an intolerable prejudicial impact on his case. In the instant case, as was the case in United States v. Smith, 635 F.2d 411 (5th Cir. 1981), the prosecutor did not focus or highlight the references to the Petitioner's silence, and the comments by the witness were not elicited by the prosecutor in a deliberate attempt to bring the defendant's silence to the attention of the jurors.

In Stone v. Estelle, 456 F.2d 1242 (5th Cir. 1977), cert. denied, 434 U.S. 1019 (1978), the court found strong evidence which weighed against the Petitioner's argument that he had suffered prejudicial harm. Referring to Doyle v. Ohio, supra, the Stone decision noted that Doyle was directed to the prosecutorial use of a defendant's prior silence to attack the defendant's exculpatory statement at trial, went to the heart of his defense, and the prosecution's reference to his prior silence was an attempt to impeach and destroy that exculpatory story. However, in Stone the attacked comment was unrelated to the defendant's innocence or his exculpatory testimony. Additionally, the Court found overwhelming evidence of guilt, and thus concluded that the remarks did not unduly prejudice

the defendant. Stone, supra, at 1245-1246. In United States v. Davis, 546 F.2d 583, 594 (5th Cir. 1977), cert. denied, 431 U.S. 906 (1977), the court spoke of "an apparent requirement that to reverse a conviction the prosecutor's comment [must] strike at the jugular of the defendant's story." Here, Petitioner simply testified at trial that after attempting to assist officers Thames and Mullinax, he was shot in the back as gunfire occurred at the scene. The challenged testimony from officer Seay was not solicited by the prosecutor in order to infer guilt, but was merely an attempt to show Petitioner was conscious and aware of what was happening around him, and that he was not in a dazed state.

Moreover, as noted previously, the prosecutor in this case did not attempt to capitalize on any testimony relating to Petitioner's failure to comment on the shooting incident. Hill v. State, supra, 250 Ga. at 284, citing United States v. Dixon, supra.

In view of the voluminous and overwhelming amount of evidence against the Petitioner, in view of the trial court's instructions to the jury, and in view of the minimum prejudicial impact that any of the challenged comments or statements may have had against Petitioner's case, if any error was committed by reference to Petitioner's remaining silent at the time of his arrest, said error was harmless beyond all reasonable doubt and could not have contributed to the jury's verdict.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully urges this Court to deny the petition for a writ of certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent, certify that I am a member of the Bar of the Supreme Court of the United States, and that in accordance with the Rules of the Supreme Court of the United States, I have this day served Counsel for the Petitioner with a true and correct copy of this brief for the Respondent in Opposition, by depositing a copy of same in the United States Mail, with adequate postage attached thereto, and properly addressed to:

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This 2nd day of March, 1983

NICHOLAS G. DUMICH